WP(C) 87/2007
BEFORE
HON'BLE JUSTICE B.K. SHARMA

JUDGEMENT AND ORDER

1. The petitioner, serving in the Air Force as Sergeant (Sgt), is aggrieved by denial of promotion to the next higher rank of Junior Warrant Officer (JWO).

2. The petitioner joined Indian Air Force on 04.11.88 as a regular Airman. Presently he is serving as Sgt. It is his case that the Airmen much junior to him have been illegally included in the promotion penal for the year 2006-2007 for promotion to the next higher grade of JWO in the capacity of Acting Paid JWO.

3. According to the petitioner, the respondents while preparing the penal for promotion to the rank of JWO in the capacity of Acting Paid JWO have violated the Air Force Instruction (AFI) (Annexure-A). The petitioner has put to challenge the Circular dated 23.09.02 issued by the Air Force authority which according to the petitioner is in contravention and deviation of the AFI referred to above which has got statutory force. It is the case of the petitioner that the Chief of Air Staff (CAF) who has issued the Circular dated 23.09.02 is not authorized to make any deviation from the AFI. It will be apposite to refer to the relevant provision of the AFI at this stage.

Para-15- Substantive Promotion- Groups I to IV (reconstituted from earlier Groups I to V): Service for the purpose of promotions will reckon from the date of Commencement of ab initio Course in which an airman successfully passes out. Enrolment date will, however reckon for all purposes other than seniority for promotion, such as pay, allowances, pension, gratuity etc. In the case of airmen reporting late for the Courses, the seniority for promotion will reckon from the actual date of reporting, except that the following categories of airmen joining the ab-initio training after the Basic Phase will be deemed to have joined that training from the date of its commencement for the purpose or reckoning seniority for promotion.

(a) Airmen who were initially selected and detailed for training in Technical trades, but are subsequently re allotted non technical trades on being found unsuitable for Technical trades after they have successfully undergone the Basic Phase
(b) Airmen who were remustered to non-allied trades in higher Trade Groups.

Provided the Airmen are otherwise considered fit, the normal periods of Substantive promotion will be as under:

(i) Promotion to Corporal will be confined to LACs who have served in that classification for three years or have completed five years total service and have passed the appropriate tests.
(ii) Promotion to sergeant will be made by selection within the authorized establishment and will be confined to Corporals who have served in that rank for four years or have completed 8 years total service.
(iii) Promotion to Junior Warrant Officer will be made by selection within the authorized establishment and will be confined to sergeants who have served in that rank for four years or have completed 16 years total service. Whichever is later.
(iv) Promotion to Warrant Officers will be made by selection within the authorized establishment and will be confined to Junior Warrant officers with 2 years service as such.

Para 16 Acting (paid) Promotions: (I) Acting (paid) Promotions will be made when establishment vacancies exist, but individuals of requisite ranks are not available for substantive promotion. Acting rank will not become paid acting rank until it has been held for a continuous period of 28 days, when it will be converted into paid acting rank with retrospective effect. Provided the airmen are otherwise fit and until further orders the minimum qualifying periods which will render an airman eligible for consideration for acting (paid) promotion to higher ranks will be as given below:

Groups I, II and III- One year's minimum service in each rank (substantive, temporary or acting)

Example- an individual who has completed one year's service as a Corporal (substantive, temporary or acting) may be promoted to acting (paid) sergeant.

Group IV and V

LAC to CPL	1 ‰ year's service as LAC
Cpl. to Sgt	1 ‰ year's service as CPL (substantive temporary or acting)
Sgt to F/sgt	1 year's service as Sgt. (substantive, temporary or acting)
F/Sgt to W/O	1 year's service as F/Sgt (substantive temporary or acting)

(ii) In exceptional cases, the above periods may, however, be relaxed at the discretion of the Officer i/c R.I.A.F. Records, in the case of airmen for the rank of Sgt. and below by the Air H.Q. in the case of F/Sgt. and above.

(iii) An airmen, who has been granted acting (paid rank, will retain it during leave, sickness or temporary duty, unless it is found essential in the interest of the service to post another airman of that rank in his place in which case the absentee airman will relinquish his acting rank.

(iv) An airmen is, however, to relinquish the acting (paid) rank if he is posted to a vacancy established in a lower rank.

(v) If the airman is posted to another unit unless he is posted to a similar establishment vacancy at his new unit, in which case the draft note will be endorsed to state that the acting rank is retained on posting he shall relinquish the acting rank held. Grant of the rank of the new appointment will be subject to the conditions specified in clause (i) above.

(vi) I- Absence due to sickness (excluding wounds and attributable injuries) Retention of acting rank - An airman, whose sickness is not due to his own fault, will retain his acting paid rank for a maximum period of two months as under:

a) Whilst in India- against the unit establishment for the first 28 days and supernumerary to the establishment for the balance of two months.

b) Whilst on duty ex-India- supernumerary to the establishment for the entire period of his sickness from the first day of absence from duty.

II- Absence on account of wounds or injuries- If an airman cease to perform his duty on account of wounds or injuries attributable to Air Force Service he will retain, without counting against the establishment of his unit or formation, his acting paid rank from the date of first absence from duty for a period of four months or until reposted to duty, which ever is earlier.

(vii) The acting rank will also be relinquished if there ceases to be a vacancy in the establishment, owing to the posing to his unit of an airman of the appropriate acting or substantive rank or to a reduction in the establishment of the unit.

(viii) If the airman is considered by his CO to be unsuitable to continue to ho

ld the acing rank, he will be reverted to his substantive rank. In such cases, t he authority of the AOC group concerned is to be obtained before reversion I eff ected. &
(xi) On substantive promotion to a higher rank, the periods already served in that rank in an acting (paid) or temporary capacity will count collectively for determining the initial pay of the airman in that rank. &..
(xiii) There will be no temporary promotions after the issue of this Instruction . Unpaid acting rank can, however, be granted under the provisions of para 188 R egulations for the R.I.A.F. (instruction).

4. From the impugned promotion penal (Annexure B), it appears that the incu mbents named therein at serial No. 29, 30, 31 and 92 are having seniority in the present rank of Sgt. w.e.f. 01.07.03, 11.08.03, 01.07.04 and 01.07.03 respectiv ely, while the persons named at serial No. 25, 26, 27 and 28 are having seniori ty w.e.f. 01.12.02, 01.12.02, 01.12.02 and 01.01.03 respectively. According to the petitioner, they are all juniors to him and have superseded in the matter o f promotion as JWO. The circular dated 23.09.02 which according to the petitione r contravenes the AFI laying down the promotion policy speaks of eligibility cri teria, time frame for promotion, distribution of vacancies, assessment criteria for ACR etc. The relevant clauses are extracted below:

Eligibility Criteria for Promotion
2. All airmen who have completed the minimum length of service as mentioned below for promotion to the rank of JWO and above as on 30 Jun of the year (proc eeding the promotion panel), would be considered for promotion (eg. 30 Jun 03 fo r promotion year 2003-04)

Rank	Min length of service
a) Sgt. To JWO	17 Yrs.
b) JWO to WO	23 Yrs.
c) WO to MWO	28 Yrs.

Time frames for promotion
5. Time frames for promotion for the purpose of redistribution of vacancies woul d be under the following categories rank wise:

	Grade-III	Grade-II	Grade-I
a) Sgt. To JWO	17-19th Yr	20th-23rd Yr	Above 23 Yr
b) JWO to WO	23-25th Yr	26th- 29th Yr	Above 29 Yr
c) WO to MWO	28- 30th Yr	31st -34th Yr	Above 34 Yr.

Note: 17-19th Yr implies 17 yrs of service to less than or equal to 19 yrs. Of s ervice. 20th-23rd yr implies 19 yrs one day of service to less than or equal to 23 yrs of service.
e.g. if DOE is 01 Jul 84
length of service as on 30 Jun 2003-18 yrs 11 months 29 days therefore airman wi ll be eligible for promotion from Sgt. to JWO in Grade-III

Distribution of Vacancies:
6. The vacancies would be allotted in the promotion of 1:3:6 for Grade 3: Grade 2: Grade1 respectively. Thus 0% of the vacancies would be for the seniormost gro up, 30% for the middle level and 10% for the relatively junior level. A similar method would be employed for promotion to WO and MWO ranks. If the total vacanci es are less than 10 in a year, the distribution of vacancies for a particular ra nk and trade between Grade-III, Grade-II and Grade-I categories would be in the ratio 0:1:2. However, if the total trade wise/rank wise vacancies for a year are equal to or more than 10, then the ratio would be 1:3:6. For any trade and rank , if the number of eligible airmen are less than to number of available vacancie s, then the excess would be distributed as under:

a) If Grade I vacancies are in excess, redistribution between Grade III Gra de II would be 1:3

Eg. Trade= AF Fit Rank =Sgt.
No. of Grade I eligible airmen = 6
No. of Grade I vacancies = 85
Excess vacancies (85-6) = 79
Redistribution of excess vacancies between Grade-II and Grade-III would be as fo llow:
Grade-III: Grade II (at 1:3) = 20:59
b) If Grade II vacancies are in excess, distribution between Grade -III Gra de I would be 1:6
c) If Grade III vacancies are in excess, distribution between Grade-II, Gra de I would be 1:2.

5. It will be pertinent to mention here that the aforesaid policy guideline impugned in this proceeding has been issued by the authority of the Air Force H ead Quarters. On the other hand, the AFI has been issued by the higher authority of the Air Force. It has been agreed by the parties that the said AFI has got s tatutory force.

6. The respondents in their counter affidavit have justified the aforesaid circular dated 13.09.02 and have stated that the said promotion policy is within the frame work of AFI. It has been stated that having regard to the rapid chang e in the technical environment and security scenario of the Air Force, certain amendments and additions to the earlier policy guidelines were felt. According t o the respondents, the AFI only speaks of conditions of promotion by selection , but it does not lay down the detailed procedural aspect for selection and cons equently such guidelines by way of policy had to be adopted. Thus, according to the respondents, the impugned circular dated 23.09.02 is not violative of the AF I.

7. According to the respondents, the promotion being based on merit cum sen iority, superssession by the juniors is a common phenomenon which is bound to ta ke place. The respondents have gone to the extent of making a statement that if the petitioner is aggrieved by promotion of his juniors, there is no embergo in seeking discharge from service. It is the case of the respondents that although the petitioner was considered for promotion in the year 2006-2007 as per the le ngth of service, but his merit position did not make him eligible for inclusion in the promotion penal. According to the respondents, juniors to the petitioner included in the promotion penal excelled in merit than the petitioner.

8. According to the respondents, the condition precedent for grant of subst antive promotion is to be mandatorily followed for grant of Acting Paid promoti on. The respondents have justified the distribution of vacancies into three grad es as per the length of service which is 10%, 30% and 60%. In paragraph 12 and 1 3 of the affidavit, the respondents have stated thus:

12. That with regard to the statements made in paragraph-14 of the petition, th e deponent states that para 16 of AFI. 12/S/48 Acting (Paid) Promotions (i) stip ulates- Acting (Paid) Promotions will be made, when establishment vacancies exi sts, but individuals of required ranks are not available for substantive promoti on. It can be seen that though there are airmen fulfilling the eligibility cond itions required for substantive promotion are available in large number but the substantive cadre vacancies are less. Thus, authorization of substantive promoti on directly is not feasible in the present scenario. Thus action promotions are authorized in the first instance against the establishment vacancies, as per the organizational requirement and subsequently substantive promotions are authoriz ed in order of acting paid rank seniority as per the availability of substantive cadre vacancies which are sanctioned by Ministry of Defence, Government of Indi a.

13. That with regard to the statements made in paragraph 15 of the petition,

the deponent states that the contentions of the petitioner are not tenable in law and hence denied by the deponent. It is stated that acting paid promotions are granted initially against the establishment vacancies and subsequently substantive promotions are granted as per the acting seniority against the substantive cadre vacancies. The deponent reiterates what has been stated in paragraph 14 of this affidavit. Thus grant of action paid promotions are well within the frame-work of AFI 12/S/48.

9. During the course of hearing of the matter, this Court by order dated 10.04.07 granted time to Mr. D. Das, learned C.G.S.C. to obtain clarification regarding inconsistency, if any, between the aforesaid AFI and the promotion policy of 2002. Again on 14.06.07 Mr. Das prayed for further time to obtain instruction which was granted with the following order:

1) As per Annexure-A Air Force Instruction (AFI), promotion to the rank of Junior Warrant Officer will be made by selection within the authorized establishment and will be confined to Sergeants who have served in that rank for four years or have completed 16 years total service, which ever is later. But in the circular annexed to the counter affidavit as Annexure-I, prima facie there is deviation in laying down the minimum length of service as 17 years. Further in the circular time frame for promotion has also been indicated with distribution of vacancies which according to the petitioner is a clear deviation from the AFI which does not provide for any such distribution.
2) It is the submission of the learned counsel for the petitioner that Acting (paid) promotions is an exception and at the first instance substantive promotion should be made. It is only in the case when the requisite rank being not available for substantive promotion, such Acting (paid) promotion can be granted.
3) In the affidavit in opposition an indication has been given that Acting (paid) promotion will be later on converted to substantive promotion. No such indication is there in the AFI. In the affidavit, it has been contended by the respondents that in all cases, Acting (paid) promotion will be first considered and thereafter it will be converted to substantive promotion which according to Mr. Bhuyan is a clear deviation from what has been laid down in AFI.

The documents produced by Mr. Das, learned C.G.S.C. indicate that the case of the petitioner vis- -vis his 8 juniors was considered for assessment of ACRs and the mark was allotted on that basis. It will be appropriate for the respondents to produce the ACRs of the said 8 officers along with the petitioner as indicated in the said documents and also the minutes of the selection committee.

10. Pursuant to the aforesaid orders passed by this Court, the respondents have filed an additional affidavit on 06.08.07. In the additional affidavit, the respondents have reiterated their stand made in the counter affidavit. According to them, the policy guideline laying down the procedure for promotion does not supersede the AFI and/or violates the provisions of AFI.

11. Upon hearing the petitioner in person as well as Mr. D. Das, learned C.G.S.C. for the respondents and having found that the petitioner faced difficulty in expressing himself, Mr. M. Bhuyan, learned counsel was requested to render assistance to the petitioner as well as to the Court which he readily agreed. He has argued the case on behalf of the petitioner with the assistance of the petitioner. Mr. Das, learned C.G.S.C. has also argued the case on behalf of the respondents with the assistance of the Air Force personnel present in the Court.

12. The moot question which falls for consideration is as to whether the promotion policy of 2002 makes any deviation from AFI and if so, whether the same is permissible.

13. The AFI came up for consideration before the Apex Court in the case of Union of India and others vs. Mahesh Kumar Nag and another reported in (2001) 3

SCC 97. In the said case before the Apex Court the issue was relating to the promotion from the rank of Flight Engineer- (ii) to the rank of Flight Engineer-(i). Upon a reference to the AFI applicable to the case, the view expressed by the High Court that the AFI is statutory in nature and that any additional conditions imposed by way of issuing circular was impossible would have the effect of amending the AFI, has been upheld by the Apex Court. In the said decision, it has been held that the AFI is statutory in nature. While holding that the Chief of Air Staff is entitled to impose the criteria for suitability by way of a circular, but such circular cannot lay down the additional conditions or vary or amend the AFI.

14. Once it is held that the AFI has the statutory force, it will have to be seen as to whether the circular dated 23.09.02 issued from Air Force Head quarters has the effect of making additional conditions for promotion and/or amending the AFI itself.

15. As per the requirement of para-15 of AFI, the Airman otherwise considered fit, is entitled to substantive promotion on completion of the prescribed period of service which is 4 years in the rank of Sgt or completion of 16 years of total service whichever is earlier. There is no dispute that the petitioner has fulfilled both the conditions for promotion. Both the conditions are essential for promotions. Admittedly, the incumbents named at serial No. 25 to 31 and 92 at the time of their empanelment for promotion as Acting Paid JWO, going by the respective dates of their seniority in the substantive grade of Sgt. did not have the requisite four years of service in the rank of Sgt. However, the respondents have tried to justify such promotion on the ground that the promotions being not substantive and being only Acting (Paid) promotions, a deviation could be made from the requirement of the AFI.

16. It is the case of the respondents that in due course such Acting Paid promotion would be made substantive. However, on being pointed out that if the incumbents at the time of selection held in June, 2006 were not eligible for substantive promotion having not rendered four years of service in the substantive grade of Sgt., whether by efflux of time, their ineligibility would get cured entitling them substantive promotion as JWO, the Officers present in the Court including Mr. D. Das, learned C.G.S.C. furnished the answer to the effect that although the said incumbents were not eligible for substantive promotion at the time of their empanelment for Acting (Paid) promotion, but they having been promoted as such, the requirement of four years of service as Sgt. would be fulfilled, by the time they are provided with substantive promotion. On being further asked as to whether for substantive promotion any further selection would be held, the answer was in the negative. It was stated that the substantive promotion would be effective on the basis of the selection conducted for Acting Paid promotions.

17. If the aforesaid explanation furnished by the respondents is to be accepted, then in that case, the persons ineligible even for promotion as Acting Paid JWO having not fulfilled the requirement of four years of service in the grade of Sgt. would get automatic promotion as JWO on the basis of the selection conducted for promotion as Acting Paid JWO although they were not eligible for such promotion on the date of selection held in June, 2006. This will amount to relaxation of eligibility criteria as laid down in the AFI, which in my considered view, is not permissible.

18. According to AFI (para-16), Acting Paid promotions will be made when establishment vacancies exists, but individuals of requisite rank are not available for substantive promotion. Thus, the Acting Paid promotion is an exception. It is to be provided only when the individuals of requisite rank are not available for substantive promotion. In the instant case it is not the case of the respondents that the individuals of requisite rank were not available for substantive

promotion. On the other hand, it is seen that the incumbents ineligible for promotion were also considered for Acting Paid promotion.

19. Para-15 of AFI speaks of substantive promotion in terms of which promotion to JWO will be made by selection within the authorized establishment and will be confined to Sgt. who have served in that rank for 4 years or have completed 16 years of total service, whichever is latter. The condition precedent for substantive promotion having been prescribed in the AFI, the respondents could not have deviated from the same so as to provide Acting Paid promotion to ineligible persons.

20. The basic contention of the petitioner that the circular dated 23.09.02 makes a total deviation from the AFI and the same has got the effect of amending the AFI. The relevant provisions have been quoted above. As against the requisite length of service of 16 years and 4 years, the Circular dated 23.09.02 provides for 17 years as minimum length of service. While the AFI does not make any distinction among the officers eligible for promotion on completion of 4 years and 16 years of service as the case may be, the circular classifies the officers into three categories on the basis of the length of service with distribution of vacancies at the rate of 10%, 30% and 60% respectively. This is in complete deviation of the AFI which does not make any such distinction.

21. According to the respondents, they have taken recourse to Acting Paid promotion before affecting the substantive promotion. In this connection, learned C.G.S.C., during the course of hearing produced the Memorandum dated 02.06.62 issued by the Govt. of India in the Ministry of Defence. As per the said Memorandum, the condition of performance of duties in the higher rank will not be insisted upon for the purpose of substantive promotion in respect of the airmen, who ceases to perform their duties on account of wounds and injuries attributable to Air Force Service and retain, without counting against the establishment of their Unit, or formation, their Acting Paid rank from the date of their absence from duty for a period of 4 months or until reposted to duty, whichever is earlier in accordance with para 16 (vi) of A.F.I. By producing this memorandum, the respondents seek to draw an inference that substantive promotion can be done away with and substituted by Acting Paid promotion which later can be converted to substantive promotion. This memorandum on which the respondents have placed reliance is not at all applicable to the facts and circumstances of the instant case.

22. The issue as to whether the respondents could have taken recourse to Acting Paid promotion on the grounds stated in the affidavit. On perusal of the AFI, what is seen, is that the substantive promotion is the rule and the Acting Paid promotion is the exception. Nowhere in the AFI it has been prescribed that the substantive promotion could be effected only by taking recourse to Acting Paid promotion first. Even the Circular on which the respondents have placed reliance, does not provide for such a course of action.

23. The respondents have also placed reliance on the memorandum dated 01.04.58 issued by the Govt. of India in the Ministry of Defence a copy of which has been produced by Mr. Das, learned C.G.S.C. during the course of hearing. This memorandum does not in any manner amend the AFI. It does not speak of providing substantive promotion, but provides for Acting Paid promotion. The memorandum only provides for performance of duties of the rank to which the Airman is promoted with certain exceptions. The memorandum nowhere deviates from the eligibility criteria and the requirement of following the rules of substantive promotion and Acting Paid promotion in exceptional circumstances. This being the position, the respondents cannot draw any inference placing reliance on certain memoranda. There is no mention of those memoranda in the AFI, nor there is any amendment in reference to the said Memoranda.

24. It will be pertinent to mention here that the requirement of 16 years of total service was introduced by an amendment brought in 1995. Earlier requirement was 12 years of total service. If the incumbents named by the petitioner who are admittedly juniors to the petitioner were not eligible for promotion as JWO, when the selection was held, i.e. on June, 2006, the respondents could have promoted them making a deviation from the AFI having the statutory force.

25. The concluding remark of the circular dated 23.09.02 is as follows:

28. It has been our endeavour to make this promotion policy as comprehensive and transparent as possible. Every effort has been made to maintain a reasonable balance for promotions to Warrant Ranks. While merit and a fair selection process are the main considerations, seniority in service has also been given its due weightage. This policy supersedes the previous Promotion Policy issued vide Air, HQ letter No. Air HQ/S 40651/3/PA(CPC) dated 20 Oct. 98 for promotion to Warrant Ranks (Sgt. to JWO, JWO to WO and WO to MWO). This policy will come into effect from the promotion year 2003-2004.

26. From the aforesaid concluding remark of the circular, it will be seen that while merit and fair selection process are the main consideration, seniority in service is also to be given due weightage. In the instant case, the juniors to the petitioner who were not even eligible in terms of para-15 of the AFI were considered for Acting Paid promotions which according to the respondents will be converted to the substantive promotion in due course.

27. According to the respondents, based on evaluation of the ACRs, the petitioner could not qualify to the rank of Acting Paid JWO. ACRs of the incumbents have been produced by the learned C.G.S.C. On perusal of the same, it is not discernible as to on what ground, the petitioner was categorized lower in rank than the juniors named in the impugned promotion penal. It is also not discernible as to whether as per the impugned policy decision, seniority was given due weightage or not. As per the own policy guidelines of the respondents, counselling is extremely important which involves apprising the individuals of his strong and week points, achievements and suggestions for further improvement. It is basically aimed at improving the performance of the individual, which would help him in his overall personality development and ultimately benefit the organization. The policy of the respondents provides for quarterly counselling and recording of the information gathered upon such counselling in the counselling register. The respondents did not produce any such register. Thus it is not discernible as to whether before recording the relevant ACRs of the petitioner, he was favoured with any assistance or counselling.

28. All the above aspects of the matter will have to be considered by the respondents dispassionately. In view of the finding that the respondents have deviated from the AFI towards adopting the Circular dated 23.09.02 and followed the criteria laid down therein which substantially deviate from AFI having the effect of amending AFI itself, the Acting Paid promotions granting to the incumbents named in the impugned promotion penal who are admittedly juniors to the petitioner is vitiated. The respondents could not have resorted to Acting Paid promotions instead of substantive promotion having regard to the fact that substantive promotion is the rule and Acting Paid promotion is the exception. The respondents have given credence and preference to Acting Paid promotion bypassing the substantive promotion in violation of the provisions of the AFI.

29. In view of the above, entire action of the respondents in the matter of granting promotion to the JWO is illegal. Situated thus, I have no hesitation to allow the writ petition holding that the circular dated 23.09.02 is violative of the AFI and ultravires the same. The AFI having the statutory force could not have substituted by the impugned order dated 23.09.02. The matter shall now go back to the respondents for consideration of the case of the petitioner and othe

r eligible for substantive promotion as JWO strictly in accordance with the AFI. Such promotion of the petitioner shall be considered against the established va cancy from the date of his eligibility and when doing so, the respondents shall act in the matter consistently with the observations made above.

30. The writ petition is allowed, without however any order to costs.